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# Blankenbaker Lecture, University of Montana School of Law (1)

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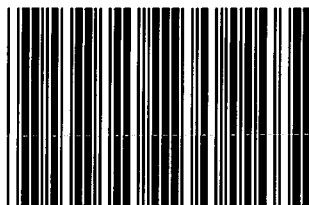
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BAUCUS

Statement of Senator Max Baucus  
Blankenbaker Lecture  
University of Montana School of Law  
April 16, 1992

INTRODUCTION

Thank you. Let me begin by expressing my appreciation to Dean Burke for inviting me to deliver this fourteenth annual Blankenbaker Lecture on Professional Responsibility.

I have long felt a close association with this institution.

Your former Dean, Jack Mudd, has been a good friend since those days in the early 1970's when I practiced law here in Missoula.

I have also come to know and respect Dean Martin Burke and many members of this law school's faculty over the years. Teachers like Marge Brown, Duke Crowley, Larry Elison (pronounced with a hard E: "Ealison"), and Al Stone have always impressed me with their deep dedication to the law, to their students, and to Montana.

Moreover, as a former member of the Montana Legislature and an attorney at the 1972 Montana Constitutional Convention, I am well aware of the important role this law school plays in shaping the laws of Montana. Both faculty and students have an admirable history of lending legal expertise to the lawmakers in Helena. I believe this is a major reason why Montana is widely recognized as having one of the most clean, modern and progressive state codes in the nation.

In the face of often limited financial resources, I believe this institution is a place of excellence; a place where ethics, professionalism, and public service are taught right along with the principles of torts, property and contract law.

For instance, just two weeks ago, several students from this law school -- one of the smallest law schools in the country -- went to Dallas, Texas to compete in the American Trial Lawyers Association National Trial Team competition. These students came home national champions. And I am aware that this law school has a consistent record of high achievement at similar previous national competitions. This makes Montana very proud.

Given my high regard for this institution, it is indeed an honor to be here today.

LAWYERS IN CONGRESS

Yet, unfortunately, I realize some may wonder whether any member of Congress -- particularly one who happens to be an attorney -- possesses much credibility on questions of ethics and professional responsibility.

This distrust of lawyers serving in public office appears to be a relatively recent phenomenon in American history. Many of our national heroes came from the ranks of the

legal profession. Jefferson, Lincoln, and Franklin Roosevelt, for instance, all practiced law. In his writings on the American government and politics of the early 19th Century, de Tocqueville paints a complimentary portrait of the lawyer's role in public affairs. de Tocqueville said:

Lawyers, forming the only enlightened class not distrusted by the people, are naturally called on to fill most public functions. The legislatures are full of them, and they head administrations; in this way they greatly influence both the shaping of the law and its execution.

And de Tocqueville had more to say about the role of lawyers in American life. As an undergraduate, I recall reading de Tocqueville as part of a survey course in Western Civilization. He described lawyers as holding the fibre of American society together. To de Tocqueville, lawyers were the professionals most responsible for resolving disputes and, thus, making our laws work.

While de Tocqueville's description of the lawyers' prominent role in government remains true today, few would claim we still enjoy such broad public trust. For example, a 1986 survey published in the National Law Journal found that ninety percent of the American people did not want their children to become lawyers. Moreover, a 1988 poll reported in the New York Law Journal found that only five percent of those surveyed viewed lawyers as the professionals they most respected.

This all reminds me of a cartoon I once saw. It depicted a man in a business suit strumming a guitar. The caption read: "Mamas don't let your babies grow up to be lawyers." And, along these same lines, I understand there are some students at this law school who have taken to wearing tee shirts emblazoned with the saying: "friends don't let friends go to law school."

Perhaps more than any single event, Watergate tarnished the image of the legal profession, particularly those members of the legal profession in public office. To most Americans, it was more than a mere coincidence that Haldeman, Ehrlichman, Mitchell, Dean and President Nixon himself were all lawyers. Having attained the highest positions of public trust, these lawyers planned and executed the coverup of the Watergate burglary. They hired another lawyer named G. Gordon Liddy to spearhead a campaign of dirty tricks. They created slush funds. They shredded documents. And they delivered special favors for major Nixon campaign contributors like the Dairymen and ITT.

As a young lawyer working for the Chairman of Securities and Exchange Commission, I saw the effects of some of these activities. It outraged me to see at least one sensitive SEC investigation die shortly after then Attorney General Mitchell paid a visit to the Chairman. Although I was not privy to this meeting, there was little doubt in my mind that Mitchell had intervened on behalf of one of President Nixon's major supporters.

Through all of this, Nixon and his men brought discredit upon two important and honorable professions: the law and public service. For the sake of winning, they seemed

ready to abandon virtually every ethical value.

Just two years after Watergate, a previously little known Georgia Governor named Jimmy Carter rode his lack of legal credentials all the way to the White House. Time and time again during the 1976 presidential campaign, he went out of his way to remind Americans that, unlike his opponent Gerald Ford, Jimmy Carter was no lawyer.

At least on a theoretical level, this reluctance to place lawyers in public office remains alive today. Perhaps it is a coincidence, but Richard Nixon's 1972 reelection marks the last time an attorney sat in the Oval Office. And when Americans are asked what is wrong with Congress, a frequent response is: Too many lawyers. It may be unfair, but most Americans view lawyers as combative, litigious, bureaucratic, and self interested.

Yet, ironically, these same Americans continue to send many lawyers -- including myself -- to Congress. Even in the wake of Watergate, when the public's suspicion of lawyers in office probably stood at an all-time high, the voters sent a disproportionate number of lawyers to Washington.

The 94th Congress, elected in 1974 included 103 new members. This constituted one of the largest freshmen classes in history. Yet it contained more than its share of lawyers. I was one of the 47 attorneys first elected that year.

And, today, lawyers swell the ranks of Congress. With 244 lawyers (46% of its total membership) today's 102nd Congress could be viewed as one of this nation's larger law firms. Both the Speaker of the House and the Majority Leader of the Senate are accomplished lawyers.

On the surface, this makes no sense. In some cases, of course, the voters may have had no choice. All the major candidates may have happened to be lawyers.

Yet it is still fair to ask, if attorneys are universally distrusted, why do so many of them occupy positions of public trust? While I do not pretend to have all the answers to this paradox, I submit that at least part of the reason lies in the nature of the legal profession and the skills lawyers acquire from their first days in law school:

- o Above all else, the study and practice of law are about public policy. More than most people, lawyers think about what policies make sense for their clients and their communities. Good lawyers care about public policy because they care about their clients and they care about their community;
- o Lawyers are advocates. In either the public or the private sector, we argue and negotiate for the interests we represent;
- o Lawyers are trained to resolve disputes. The same skills that help an attorney achieve a fair settlement for the client help a Congressman or Senator pass legislation through the maze of Congress;

o And, finally, lawyers -- at least most lawyers -- know how to write and they are not shy about acting and speaking out on issues they care about.

History is filled with examples of individual attorneys who prove this point. Just outside the Senate floor, there is an ornate reception room. Senators walk off the floor and meet with constituents, friends and reporters in this room. In the 1950's a special Senate Committee, chaired by a young Senator from Massachusetts named John Kennedy, voted to memorialize the careers of five outstanding men of the Senate. The portraits of these five Senators are painted on the walls of the reception room: Daniel Webster of New Hampshire and Massachusetts; Henry Clay of Kentucky; John C. Calhoun of South Carolina; Robert La Follette of Wisconsin; and Robert Taft of Ohio. Besides being Senators of great integrity and ability, each of these men also happened to be a lawyer.

For similar examples, we need look no further than our own state's history of representation in the Senate: Thomas J. Walsh and Burton K. Wheeler, both of whom helped blow the whistle on the Teapot Dome scandal of the Harding Administration; James Murray, the seasoned trial lawyer from Butte who distinguished himself in the Senate as an effective advocate of the working man and woman; and, Lee Metcalf, a former Justice of the Montana Supreme Court and alumnus of this law school. Out of respect for Senator Metcalf's legal skill, many of his colleagues called him "the Senate's Lawyer."

As the only attorney in the current Montana Congressional Delegation, I realize I have inherited very big shoes to fill. But, like my predecessors, I view my training as a lawyer as an asset in Washington.

### THE ETHICS OF COMPROMISE

I say this because I believe effective lawyering and effective legislating have much in common, including at least one recurring ethical dilemma.

In a courtroom, the attorney who comes in best prepared, who demonstrates the most thorough mastery of the facts, and who best understands the rules of evidence and civil procedure, usually wins.

The same is true in the Senate. Some Senators are always prepared; they pay attention to detail; they know their issue inside and out; and they play fair but they also play to win.

For example, when Georgia Senator Sam Nunn takes to the floor on an issue involving national defense, other Senators listen. While I may sometimes reach a different conclusion than Senator Nunn on defense issues, I will always carefully consider his arguments. Senator Nunn, by the way, came to the Senate as a country lawyer from the small town of Perry, Georgia.

But there is another, perhaps more important, similarity between effective lawyering and effective legislating: both involve the art of compromise. John Kennedy's book

Profiles in Courage talked about the importance of ethical compromise in the legislative process:

It is compromise that prevents each set of reformers -- the wets and the dries, the one-worlders and the isolationists, the vivisectionists and the anti-vivisectionists -- from crushing the group of the extreme opposite end of the political spectrum . . . Some of my colleagues who are criticized today for lack of forthright principles . . . are simply engaged in the fine art of conciliating . . . an art essential to keeping our nation united and enabling our government to function.

Just as few disputes actually make it to court, few issues are actually decided on the Senate floor. Just as lawyers negotiate for a settlement or a plea agreement, Senators try to resolve their differences during private meetings and committee sessions. And, just as an attorney tries to reach a settlement agreement in the client's best interest, Senators negotiate and act to reach agreements serving the public interest.

In both legislation and litigation, the process of negotiation and compromise sometimes collapses. A good lawyer should not be afraid to take his or her client's case to court when a fair settlement proves impossible. Similarly, some legislative disputes must ultimately be settled by a vote of the full Senate. Some issues simply do not lend themselves well to compromise: issues of war and peace; issues of fundamental individual rights; and, issues of professional ethics, are the most clear examples.

However, both the lawyer and the legislator learn to choose such fights carefully. In many respects, an attorney loses control of the case when it goes to court. The client's fate rests with a sometimes unpredictable judge and jury. Likewise, by deciding to let the Senate work its will in a floor vote, a Senator runs the risk of losing control over his or her legislation. It could be defeated outright. It could become a "Christmas tree" for killer amendments. Or it could be buried by a filibuster or one of the Senate's other parliamentary devices.

For these reasons, it is usually best to bargain hard but also look for common ground; to resolve conflict; to maintain control over your legislation; to seek compromise. However, compromise is almost always fraught with difficult ethical choices:

- o Where does a Senator draw the line between compromise and selling out?
- o Does the compromise represent an adequate improvement over the status quo?
- o Does the compromise adequately further a desirable public policy?
- o And, finally, is the compromise workable?

A Senator faces these choices each time the clerk calls the roll. In seventeen years of congressional service, I have cast almost eight-thousand roll call votes. During this

time, I have voted for many good bills. Yet I doubt I have ever voted for a perfect bill. Every vote requires me to weigh what I consider to be the good features of the legislation against what I consider to be the bad features of the legislation. In many cases, frankly, this results in a very close call.

Over the past two years, I have devoted considerable energy to two pieces of legislation illustrating the ethical dilemma of legislative compromise: the 1990 reauthorization of the Clean Air Act and the Montana Wilderness Bill just passed by the Senate.

### THE CLEAN AIR ACT

As a member of the Senate Environment and Public Works Committee, I had long believed the Clean Air Act of 1970 should be strengthened. According to the President of the American Public Health Association, as many as 50,000 premature deaths may have been caused each year by air pollution. Scientific studies also showed that children and the elderly were particularly vulnerable to respiratory problems caused by air pollution. At the same time, acid rain choked the life from many of our lakes and streams. While the costs of cleaner air would run into the billions of dollars, I viewed the costs of inaction as unconscionable.

Throughout the 1980's, the Reagan Administration and some business interests successfully blocked all attempts to strengthen the Clean Air Act. When the Bush Administration took office, however, prospects for a new Clean Air Act improved. President Bush campaigned promising to be "the environmental president." There was no better place for him to start making good on this pledge than by strengthening the Clean Air Act.

At the same time, I rose in seniority to chair the Senate's Environmental Protection Subcommittee, the subcommittee with jurisdiction over clean air. As the new chairman, strengthening the Clean Air Act became my top priority.

Throughout 1989, my subcommittee went to work. We held hearings. We listened to a broad array of interest groups: the Sierra Club, coal companies, oil companies, public health organizations, auto manufacturers, the Chamber of Commerce, the National Association of Manufacturers, the Environmental Defense Fund, the Natural Resources Defense Council, and many state and local governments, to name just a few. Ultimately, we reported a bill to the full Senate that would have taken giant strides toward reducing air pollution and acid rain.

While I believe this legislation was excellent public policy, it became highly controversial. Many viewed it as too expensive, too tough on business. Some Republicans and auto industry state Senators promised a filibuster. And, while the Bush Administration wanted a new Clean Air Act, they also believed my subcommittee's bill went too far.

Gridlock set in. Opponents of this legislation probably lacked the votes to defeat it outright. However, they could certainly muster the more than 40 votes needed to talk the



bill to death in a filibuster.

In the hope of reviving this process, the Senate began a round of intense negotiations with the Administration. Both sides bargained hard. On several occasions, these talks approached breakdown. For instance, the Administration opposed my Subcommittee bill's provision establishing a second round of more stringent auto tailpipe standards in the year 2,000. In my view, this provision was essential to cleaning up the air in some of this nation's most polluted cities. Ultimately, however, we were able to strike a compromise that met my goal of cleaner air: if, by the year 1998, the air in these cities remained unhealthy, the tougher second round standards would take effect.

While this agreement was not as environmentally strong as I would have liked, I accepted it passed my two fundamental tests for any new clean air bill: (1) it still meant much, much cleaner air than the existing law; and, (2) it could probably pass the Senate.

Once this agreement was struck, however, it remained vulnerable to amendments on the Senate floor. As subcommittee chairman and manager of the legislation once it reached the floor, it was my job to defend the compromise; to fend off killer amendments from both sides. I was bound to stand by the compromise -- even in the face of amendments I personally supported.

The Clean Air Act remained on the Senate floor for almost three months. During this time, a number of amendments were offered. Many of them would have unraveled the agreement with the Administration and killed all chances for passage of a new Clean Air Act. Ironically, the substance of many of these amendments came right out of my subcommittee's original bill. Yet I opposed each of them because they were deal breakers. Their passage would have meant no bill. And no bill would ultimately have meant dirtier air. Let me provide two such examples:

1. Senator Frank Lautenberg of New Jersey offered an unsuccessful amendment to restore my subcommittee bill's provisions reducing toxic emissions from automobiles. Based solely on its merits, there is no doubt restoring this provision would have reduced cancer deaths. However, it was also clear that its inclusion would have killed the bill.
2. Senators Tim Wirth of Colorado and Pete Wilson of California offered an amendment to restore my subcommittee bill's provisions tightening emission standards for automobiles and further mandating the use of alternative fuels in America's most polluted cities. As with the Lautenberg amendment, I strongly supported the substance of this amendment. However, in order to keep the overall legislation alive, I successfully led the opposition.

Throughout debate on the Clean Air Act, special interest groups lobbied hard to upset the Senate-Administration compromise. Environmental groups fought hard for strengthening amendments. At the same time, a coalition of business groups dubiously entitled the "Clean Air Working Group" did all they could to pull the Senate in the opposite direction. Had either of these groups prevailed on a single sensitive vote, we

would probably not have a new Clean Air Act today.

## MONTANA WILDERNESS

The recently passed Montana Wilderness Bill provides a similar case in point. For over a decade, Montanans and their congressional delegation had been arguing over this issue.

Today, Montana remains one of only two states in the West without a wilderness bill. National Forest management in our state remains in limbo. Wild areas -- critical wildlife habitat, the headwaters of some of our blue ribbon trout streams, and some of our best back country recreation areas -- enjoy no truly secure protection. At the same time, other areas with valuable resources remain very difficult to access. Congress must act to determine the appropriate balance between protecting jobs and protecting the environment.

Over the past decade, however, special interests on both sides have stood in the way of achieving such a balance. Through many hearings, many public meetings, and many press releases, this issue became more political than substantive. It provided great political theater and great election year fodder. Today, politics is the only thing standing between Montana and resolution of the wilderness issue.

This stalemate has hurt Montana. It has become like a gigantic lawsuit spinning out of control; a lawsuit where the attorney fees alone already exceed any potential jury award. For Montanans, our inability to compromise and settle wilderness and other difficult issues -- issues like reforming our tax system and education funding -- has become a serious impediment to improving our economy and quality of life.

Last year, Senator Burns and I agreed it was time to put aside our differences and do everything possible to resolve the wilderness issue. We began miles apart. I tended to err on the side of protecting wild land. Senator Burns, in contrast, wanted more lands released. There were some areas, along the Rocky Mountain Front particularly, where I was unwilling to accept any significant reduction in wilderness. Yet, gradually, through many hours of personal negotiation, we worked our way toward a bill we could both support.

Neither one of us would call it a perfect bill; no compromise is perfect. And we have both endured significant criticism from special interest groups on both sides of this issue who demand nothing less than their own version of perfection. What these groups fail to realize is that by holding out for everything, they run the risk of getting nothing at all.

The bill that passed the Senate represents many difficult choices for both myself and Senator Burns. From my perspective, I have a great reverence for Montana's wild land. I have hiked and camped in many of the areas involved in this legislation. While the vast majority of the areas I have long proposed for wilderness are protected in our bill, some are not. In a perfect world, I would like more wilderness.

But I am troubled about the ethics of irresolution on this issue. While it might be

politically expedient to avoid such tough decisions, to pander to my political base within the environmental community, it would also be wrong.

It would be like a lawyer counseling his client to refuse a reasonable settlement offer because taking the case to court would be more lucrative for that attorney.

## CONCLUSION

In closing, it is no secret that today's public feels enormous frustration with Washington's inability to compromise and make politically difficult decisions. Both Congress and the President are like two lawyers who never seem to settle a case.

Moreover, this frustration has manifested itself within the Senate. In the past month, three of my colleagues have abruptly decided to retire. In a floor statement shortly before announcing his retirement, Republican Senator Warren Rudman of New Hampshire spoke eloquently about why he might leave the Senate. Senator Rudman said:

The thing that has really been troubling me for the last three or four months, as I try to determine whether to spend another six years of my life in this place is . . . is it worth it? Can you do anything? Can you accomplish anything? Can you make the country better? Are you part of a solution rather than part of the problem?

This all reflects a frustration, an anger, with the inability of Congress and the President to negotiate in good faith, to compromise, and to get things done. Special interests go out of their way to discourage compromise. They command the media. They brand any compromise a "sellout." And because the public only hears from these groups on most issues, the public becomes confused, angry, and sometimes justifiably cynical.

In his recent book, The Disuniting of America Historian Arthur Schlesinger, Jr. contends that the "centrifugal forces" of special interest politics are tearing this country apart: the President criticizes Congress, and congressional leaders respond by taking after the President; the timber industry criticizes the environmentalists, and the environmentalists blast the timber industry; business bashes labor, and labor fires back at business full force.

Nobody compromises and nothing gets accomplished.

I believe the legal profession can help this country out of this mess. Just as de Tocqueville described lawyers as the key to order in early American society, I believe today's lawyer have an ethical responsibility to use his or her skills to help resolve the disputes paralysing this country.

More than any other profession, we have the tools to bring closure to tough issues. We are both advocates and problem solvers. We are trained to be leaders. We are trained to make the difficult choices. When we put these skills to use, we can achieve great results for our clients, our community, our state and our nation.  
Thank you.